TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 207

LENA ROSENMAN AND THE NATIONAL CITY BANK OF NEW YORK, A CORPORATION, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF LOUIS ROSENMAN, DECEASED, PETITIONERS,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 29, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 3, 1944.

—2767

[fol. 1] **IN THE UNITED STATES COURT OF CLAIMS**

Docket No. 45197

LENA ROSENMAN and THE NATIONAL CITY BANK OF NEW YORK, a corporation, as Executors of the Last Will and Testament of Louis Rosenman, deceased, Plaintiffs,

against

THE UNITED STATES OF AMERICA, Defendant.

PETITION—Filed May 25, 1940

To the Honorable Court of Claims of the United States and the Honorable Judges Thereof:

The plaintiffs, Lena Rosenman and The National City Bank of New York, a corporation, as executors of the last will and testament of Louis Rosenman, deceased, respectfully represent to this Honorable Court, upon information and belief, as follows:

1. At all times hereinafter mentioned the plaintiff Lena Rosenman was and now is a resident of the Borough of Brooklyn, County of Kings, State of New York, and the plaintiff The National City Bank of New York was and now is a national banking association duly organized and existing under the laws of the United States with its prin-
[fol. 2] cipal office at 55 Wall Street, Borough of Manhattan, City, County and State of New York.

2. Louis Rosenman died December 25, 1933, a resident of the Borough of Brooklyn, County of Kings and State of New York, leaving a last will and testament, which was duly admitted to probate in the Surrogate's Court for the County of Kings, State of New York, to which jurisdiction in that behalf belonged, and on February 7, 1934, letters testamentary were duly issued out of said court to the plaintiffs, Lena Rosenman and The National City Bank of New York, and Samuel Rosenman, who duly qualified as executors of the said last will and testament and at all times hereinafter mentioned until May 10, 1940, acted as such executors. On May 10, 1940, the Surrogate's Court for the County of Kings, State of New York, revoked the letters testamentary issued to Samuel Rosenman, as an

executor, by an order bearing that date, which said order directed Lena Rosenman and The National City Bank of New York to continue to act as such executors, and they have been ever since and still are duly qualified and acting as such executors. A duly authenticated copy of the record of the appointment of the plaintiffs as such executors is filed herewith pursuant to Rule 9. Said appointment is unrevoked and remains in full force and effect.

3. The plaintiffs have a just claim against the defendant for the sum of $24,717.12, together with interest as provided by law, which said sum was paid by the said executors of the estate of Louis Rosenman, deceased, to the defendant through the duly appointed, qualified and acting United States Collector of Internal Revenue for the First [fol. 3] District of New York, as hereinafter set forth. The claim is founded upon the laws of the United States relating to internal revenue, to wit: the Revenue Act of 1926 as amended and the Revenue Act of 1932 as amended, particularly the sections of said Acts relating to federal estate tax, being Sections 300-325 of the Revenue Act of 1926 and Sections 401-403 of the Revenue Act of 1932. This suit is filed under Sections 145 and 156 of the Judicial Code and Sections 3772 and 3313 of the Internal Revenue Code.

4. Pursuant to an extension granted by the United States Commissioner of Internal Revenue, the time within which the United States estate tax return of the estate of Louis Rosenman, deceased, might be filed was duly extended to and including February 25, 1935.

5. On December 24, 1934 the said executors of said estate paid to or deposited with the duly appointed, qualified and acting United States Collector of Internal Revenue for the First District of New York the sum of $120,000, to be held for the account of said executors and to be disposed of as follows: to be applied, to the extent necessary therefor, in payment of such United States estate tax as might be shown to be due and payable upon the United States estate tax return thereafter to be filed by said executors, and the balance of said sum to be repaid and refunded to said executors.

6. On February 25, 1935, said executors duly executed and filed the United States estate tax return of said estate, in accordance with the provisions of law in that regard and

the regulations of the Secretary of the Treasury established in pursuance thereof. The estate tax shown to be due and payable on said return was $80,224.24.

[fol. 4] 7. Thereafter the tax shown to be due on said return, as aforesaid, was assessed and the said collector, on or about March 28, 1935, applied $80,224.24 of the $120,000.00 paid to or deposited with him by said executors, as aforesaid, in satisfaction of said assessment.

8. On March 26, 1938, said executors duly filed with the Commissioner of Internal Revenue, in accordance with the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, a claim for the refund of $39,775.76, being the balance of the said sum of $120,000.00 remaining after the application of $80,224.24 thereof to the payment of the assessment of federal estate tax shown to be due on the said estate tax return, as hereinabove set forth, and therein duly demanded the refund and repayment of said sum.

9. In April 1938, the Commissioner of Internal Revenue assessed an additional federal estate tax of $48,534.84 against the said executors of said estate, in addition to the tax of $80,224.24 shown on the return, as aforesaid, and on April 16, 1938, the said collector applied said balance of $39,775.76, hereinabove referred to, toward the payment of said additional assessment, and on April 26, 1938, served upon said executors a notice and demand for payment of the further sum of $8,759.08 in payment of the balance of said additional assessment, together with interest of $1,738.26, a total of $10,497.34, and in and by said notice and demand the said collector demanded the immediate payment of said sum and notified the said executors that if said sum were not paid within thirty days liability for interest thereon at the rate of 6% per annum would be [fol. 5] incurred. The said executors, acting under duress of said threat and in order to avoid liability for interest on said sum of $10,497.34, duly paid the same to the said collector on April 27, 1938.

10. The assessment of said additional estate tax, as aforesaid, was based upon the determination of the Commissioner of Internal Revenue that the said decedent's gross estate was $1,706,596.10; that the allowable deductions (not including specific exemptions) were $361,361.71;

that for the purpose of the federal estate tax imposed by the Revenue Act of 1926 the net estate was $1,245,234.39; that for the purpose of the federal estate tax imposed by the Revenue Act of 1932 the net estate was $1,295,234.39; and that the allowable credit for state, estate, inheritance, legacy and succession taxes was $53,335.45.

11. In the determination of the net estate for the purposes of the federal estate taxes imposed by the Revenue Acts of 1926 and 1932, hereinabove referred to, the Commissioner of Internal Revenue erroneously and illegally failed to allow the following deductions, amounting to $173,169.14, which properly were allowable in computing the net estate subject to tax under said Acts:

Executors' commissions in the sum of	$91,685.45
Attorneys' fees in the sum of	31,000.00
Amount paid in final satisfaction of claims of Martin Rosenman against the estate	25,000.00
Miscellaneous expenses incurred in the administration of the estate	25,483.69
	$173,169.14

[fol. 6] 12. The federal estate tax due from and payable by said estate under the provisions of the Revenue Act of 1926 was $10,853.04, and the additional federal estate tax due from and payable by said estate under the provisions of the Revenue Act of 1932 was $94,927.18, making a total federal estate tax due from and payable by said estate of $105,780.22.

13. On May 20, 1940 the plaintiffs duly filed with the Commissioner of Internal Revenue, in accordance with the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, a claim for the refund of the tax and interest of $24,717.12 paid as aforesaid, and therein duly demanded the refund and repayment of said amount, together with interest as provided by law.

14. On May 26, 1938 the Commissioner of Internal Revenue denied and rejected the said claim for refund filed on March 26, 1938, as aforesaid, and notified the said executors to that effect by a notice mailed by registered mail on said date. On May 21, 1940 the Commissioner of Internal

Revenue denied and rejected said claim for refund filed on May 20, 1940, as aforesaid, and notified the plaintiffs to that effect by a notice mailed by registered mail on said date. No part of the sum so claimed in either of said refund claims has been credited, refunded or repaid to the plaintiffs or to anyone for their account.

15. The plaintiffs and each of them have always borne true allegiance to the Government of the United States and have not in any way aided, abetted or given encouragement to rebellion against said Government. They have not, nor [fol. 7] has either of them, assigned this claim, or any part thereof, and the plaintiffs are justly entitled to the amount herein claimed, after allowing all just debts, credits and off-sets. No action upon the claim upon which this suit is founded, other than that hereinabove set forth, has been taken before the Congress or in any department of the Government of the United States or in any court.

Wherefore, the plaintiffs demand judgment against the defendant, The United States of America, for the sum of $24,717.12, together with interest as provided by law.

Mitchell, Taylor, Capron & Marsh, Attorneys for Plaintiffs, Office and Post Office Address, 20 Exchange Place, Borough of Manhattan, City and State of New York.

George Craven,
Of Counsel.

[fol. 8] *Duly sworn to by W. G. Chisolm. Jurat omitted in printing.*

[fols. 9-10] General Traverse—Filed June 7, 1940

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Samuel O. Clark, Jr., Assistant Attorney General.
JWH FKD.

ARGUMENT AND SUBMISSION OF CASE

On November 4, 1943, the case was argued and submitted on merits by Mr. Carter T. Louthan for plaintiff, and by Mr. J. W. Hussey for defendant.

[fol. 11] **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Whitaker, J.**—Filed February 7, 1944

Mr. Carter T. Louthan for the plaintiffs. *Messrs. Mitchell, Taylor, Capron & Marsh* were on the briefs.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

SPECIAL FINDINGS OF FACT

1. The plaintiffs, Lena Rosenman, a resident of Brooklyn, New York, and the National City Bank of New York, a national banking association with its principal office in New York City, are the duly qualified and acting executors of the last will and testament of Louis Rosenman who died a resident of King's County, the State of New York, December 25, 1933.

2. December 11, 1934, the plaintiffs requested an extension of time within which to file the Federal estate tax return for the estate and on December 15, 1934, the time to file such return was extended by the Commissioner [fol. 12] of Internal Revenue to February 25, 1935, the letter granting such extension reading in part as follows:

> Reference is made to your application of December 11, 1934, for an extension of time within which to file the Federal Estate Tax return, Form 706, for the above-named decedent. As the facts show that it is impossible to file a reasonably complete return on the due date, an extension to February 25, 1935, is hereby granted. No further extension of time will be granted and a re-

turn as complete as possible should be filed before the expiration of this extension period.

The extension of time for filing the return does not operate to extend the time for payment of the tax. It is suggested that the tax be estimated and paid to avoid delinquency in payment, the consequent liability for penalty and the accumulation of interest at the rate of one per centum per month from the due date until paid.

3. December 24, 1934, plaintiffs delivered to the collector a check for $120,000 accompanied by a letter of transmittal which read as follows:

Henry Hetkin, Esq., of 70 Pine Street, New York, N. Y., and this office represent Mrs. Lena Rosenman, Mr. Samuel Rosenman and The National City Bank of New York, the executors of the Estate of Louis Rosenman, who died on December 25, 1933. By letter from the Commissioner of Internal Revenue to the executors, dated December 15, 1934, the time to file the Federal Estate tax return for this estate has been extended to February 25, 1935.

We are delivering to you herewith, by messenger, an Estate check payable to your order, for $120,000, as a payment on account of the Federal Estate tax. Kindly acknowledge receipt of this check on the enclosed carbon of this letter, and return that carbon to us by the messenger; also kindly send us your usual receipt, in duplicate as soon as convenient.

This payment is made under protest and duress, and solely for the purpose of avoiding penalties and interest, since it is contended by the executors that not all of this sum is legally or lawfully due.

4. Account 9 is a suspense account in the books of the collector of internal revenue for the first district of New York to which monies received in connection with Federal estate [fol. 13] taxes and other miscellaneous taxes are deposited if no assessment against the person making such payment is outstanding at the time such monies are received. All payments placed in Account 9 are deposited as internal revenue collections to the credit of the Treasurer of the United States in the same manner as collections which

are applied immediately to some account on the assessment list.

5. At the time the collector received such sum of $120,000 from plaintiffs, no assessment of estate tax was outstanding against the estate of Louis Rosenman, and on December 26, 1934, the collector placed the sum of $120,000 to the credit of that estate in Account 9 in his books. February 25, 1935, plaintiffs executed and filed the United States estate tax return of the estate which showed an estate tax of $80,224.24 to be due and payable. Upon the receipt of such estate tax return, the amount of $120,000 standing to the credit of the estate in Account 9 on the collector's books was identified. The tax of $80,224.24 shown to be due on the return was assessed in March 1935, and on March 22, 1935, the amount of $120,000 was classified and $80,224.24 thereof was credited against the assessment of $80,224.24. The balance of such amount of $120,000, that is, $39,775.76, remained in Account 9 to the credit of the estate until April 1938, as shown by findings 8 and 9.

6. March 28, 1935, the collector forwarded to plaintiffs a notice and demand for estate tax which showed that the $120,000 paid in December 1934 had been credited to Account 9 and that $80,224.24 thereof had been applied in satisfaction of the tax of $80,224.24 assessed on the Federal estate tax return.

7. March 26, 1938, plaintiffs filed with the collector a claim for the refund of $39,775.76, the difference between the amount of tax shown to be due on the estate tax return filed for the estate and the $120,000 paid to the collector, on the ground that the notice and demand forwarded to the plaintiffs by the collector on March 28, 1935, showed that $39,775.76 was due and owing to the plaintiffs.

8. On audit of the Federal estate tax return filed by the plaintiffs for the estate, the Commissioner determined that the gross estate was $1,706,596.10, that the allowable de- [fol. 14] ductions exclusive of the specific exemption were $361,361.71, resulting in a net estate of $1,245,234.39 for the purposes of the tax imposed by the revenue act of 1926, and a net estate of $1,295,234.39 for the purposes of the tax imposed by the revenue act of 1932, and that the total net tax, after allowing a credit of $53,335.45 for State

estate and inheritance tax payments, was $128,759.08. After taking into account the estate tax of $80,224.24 shown to be due on the return, an estate tax deficiency of $48,534.84 was determined to be due by the Commissioner and notice thereof was mailed to plaintiffs. No appeal was filed by plaintiffs with the Board of Tax Appeals within the ninety-day period allowed for such filing and the deficiency of $48,534.84 was assessed in April 1938.

9. In April 1938 the collector applied the balance of $39,775.76 standing to the credit of plaintiffs in Account 9 in partial satisfaction of the deficiency of $48,534.84 so assessed against plaintiffs. April 16, 1938, the collector demanded payment of the balance of the assessment, that is, $8,759.08, together with interest thereon of $1,738.26. April 22, 1938, plaintiffs paid to the collector the total amount so demanded of $10,497.34.

10. May 26, 1938, the Commissioner rejected the claim for refund filed by plaintiffs March 26, 1938, on the ground that a deficiency of $48,534.84 in Federal estate tax had been assessed and that accordingly there was no overpayment and notified plaintiffs to that effect by notice sent by registered mail on that date.

11. May 20, 1940, plaintiffs filed with the collector a claim for refund of $24,717.12 of the estate tax theretofore paid on the grounds that in computing the net estate for the purposes of the taxes imposed by the revenue acts of 1926 and 1932 additional deductions should be allowed for $91,685.45 of executors' commissions, for $31,000 of attorneys' fees, for $25,483.69 of miscellaneous administration expenses, and for $25,000 paid to Martin Rosenman in settlement of his claims. May 22, 1940, the Commissioner rejected that claim on the ground that no evidence had been submitted in support of the deductions claimed and on the further ground that the tax in excess of $10,497.34 had been paid more than three years prior to the filing of the claim, [fol. 15] and notified the executors to that effect by notice sent by registered mail on that date.

12. The parties to this suit have stipulated that the amounts paid by plaintiffs and allowed by the Surrogate's Court as administration expenses which heretofore have not been allowed as deductions are properly allowable as deductions in determining the net estate of the decedent

for the purposes of the Federal estate taxes imposed by the revenue acts of 1926 and 1932 as follows:

Executors' commissions	$79,030.26
Attorneys' fees	31,000.00
Miscellaneous expenses	25,483.69

13. In determining the net estate of the decedent for the purposes of the Federal estate taxes imposed by the revenue acts of 1926 and 1932, the Commissioner did not allow as a deduction the sum of $25,000 which was paid to Martin Rosenman by the estate as shown by subsequent findings.

14. The decedent's only son, Martin Rosenman, for whose primary benefit one-sixth of the decedent's estate was bequeathed in trust under his will (the other five-sixths being bequeathed in trust for the primary benefit of his widow and four daughters) filed two claims against the decedent's estate. The first claim dated February 27, 1934, read as follows:

> I hereby make demand upon you for the delivery to me as soon as practicable, the following securities with uncollected coupons attached, which were held by the deceased for my account: [Then followed a list of fourteen securities.]

The second claim, dated July 23, 1934, read as follows:

> I hereby make demand upon you for interest, dividends and proceeds of sales with interest from this date, of the following securities belonging to me or having belonged to me until their sale, which were in the possession of the late Louis Rosenman. He collected these items and failed to turn them over.
>
> [Then followed a list of the same securities as shown in the letter of February 27, 1934, with two or three additions.]
>
> [fol. 16] The basis of this claim is practically the same as that of my letter of February 27, 1934. These items may all be found in the check book of the deceased under my name and in his ledger as well.
>
> You will find that the deceased, on making transfer of securities often reserved for himself all coupons maturing within two months of the transfer.

The contention of Martin Rosenman was that the decedent had made gifts of these securities to him (Martin)

during the decedent's lifetime, and that these securities and the proceeds therefrom were in the possession of the decedent at the time of his death, but were held by the decedent at that time for Martin's account. The total amount of Martin's claims against the estate was approximately $167,000, such amount being the approximate value at the time of decedent's death of the property which Martin claimed.

15. On decedent's death the securities claimed by Martin Rosenman were found in two safe deposit boxes of the decedent, to one of which Martin had access. Some evidence existed which tended to support the claim, but after making as thorough investigtion as it was possible to make, including examining the decedent's records, checking his office files, interviewing the bookkeeper who kept a record of his securities and the income therefrom, and examining Martin's income tax returns which were prepared prior to the decedent's death and signed by the decedent as Martin's agent, plaintiffs concluded that Martin did not have a just and valid claim for the securities and cash to the extent claimed and accordingly notified him October 25, 1934, that the claim was rejected.

Thereafter further negotiations were carried on between the parties for a settlement of the controversy with the result that on June 8, 1935, an agreement was reached under which plaintiffs agreed, subject to the approval of the Surrogate's Court, to pay, and Martin agreed to accept, $25,000 in full payment and satisfaction of his (Martin's) claims. In presenting the matter to the Surrogate's Court for approval, plaintiff stated they had concluded the compromise was fair and reasonable for the following reasons:

> The validity of the claim was apparently sustained to some extent by the fact that the decedent caused in- [fol. 17] come tax returns to be prepared for the said claimant Martin Rosenman, reflecting in the same the income from the said securities and the losses resulting from the sales of such of the securities as were sold during the taxable year, which tax return entries could not be explained by a desire of the decedent to minimize income taxes, for the reason that the income returned was exceeded by the loss returned. Your petitioners were also influenced by the fact that the adult benefici-

aries substantiated the contention of the said Martin Rosenman to the effect that the decedent intended to make a gift of the said securities, being motivated by a desire to equalize gift provisions which he had already made for the benefit of his other adult children, and moreover, your petitioners are informed and believe that the other adult children acknowledge that provisions were made for their benefit by the decedent which have not been otherwise equalized with respect to said Martin Rosenman. Your petitioners were also greatly influenced in arriving at their conclusion that the said offer of compromise was just, in that it would tend to preserve a more harmonious family relationship, avoid the uncertainties of litigation involving a possible maximum loss to the Estate in excess of $167,000, and save the expense and avoid the danger of protracted litigation. Accordingly, when your petitioners ascertained that all of the adult beneficiaries interested in said Estate agreed with the foregoing, they entered into the compromise agreement which, as aforesaid, is hereto annexed and made a part hereof.

16. Pursuant to the provisions of section 19 of the Decedent Estate Law of New York, a formal written agreement setting forth the terms of the settlement referred to in the preceding finding was entered into, subject to the approval of the Surrogate's Court, which was executed by the executors, Martin Rosenman, all adult beneficiaries of the estate, and the guardians representing an infant and unknown beneficiaries. The plaintiffs filed a verified petition in the Surrogate's Court, Kings County, New York, to which were attached such agreement of compromise and copies of the claims of Martin Rosenman. Such petition set forth the facts relating to Martin Rosenman's claims and the propriety of the compromise and described the infant and adult persons, as well as the unborn and unknown persons, whose interests would or might be affected by such compromise, [fol. 18] and prayed that the Court take such action and make such decrees as might be necessary to approve such compromise and make it binding upon all parties interested in the estate.

17. The Surrogate's Court appointed a special guardian to represent the interests of the infant beneficiary of the estate who was over fourteen years of age and a special

guardian to represent the interests of the other infant and unborn and unknown beneficiaries of the estate and appointed a referee to ascertain the jurisdictional facts and to hear and determine whether the proposed compromise was a proper one and to report to the Court. The referee held hearings at which evidence was introduced as to whether it was a fair compromise. One of the guardians originally filed a report objecting to the proposed compromise, but later withdrew such objection and the other guardian filed a report approving the proposed compromise. After the hearings and in accordance with the instructions of the referee, both guardians signed the compromise agreement on behalf of their wards, subject to the approval of the Surrogate's Court. The referee reported to the Surrogate's Court that such proposed compromise was a proper one and that it should be approved. The Surrogate's Court entered a final decree in the proceeding approving the compromise and ordering the executors to pay $25,000 to Martin Rosenman in full satisfaction of his claims upon the delivery by Martin Rosenman of an instrument acknowledging the receipt of such sum in full satisfaction of his claims. Such $25,000 was paid to Martin Rosenman by the executors, and Martin Rosenamn delivered an instrument acknowledging receipt of such sum in full satisfaction of his claims.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a matter of law that the plaintiffs are entitled to recover.

Entry of judgment will be withheld to await the filing of a stipulation by the parties, or, in the absence of a stipulation, until the incoming of a report by a commissioner as to the correct amount due plaintiffs, computed in accordance with this opinion.

[fol. 19]

Opinion

Whitaker, Judge, delivered the opinion of the court:

Plaintiffs, the executors of the last will and testament of Louis Rosenman, sue to recover estate taxes alleged to have been erroneously exacted. The claim is based upon their right to deduct from the gross estate sums for executors' commissions, attorneys' fees, miscellaneous expenses,

and an item of $25,000 paid to Martin Rosenman in settlement of a claim he presented against the estate.

The items of executors' commissions, attorneys' fees, and miscellaneous expenses are not in dispute, but defendant denies that the estate is entitled to the deduction of the $25,000 paid to Martin Rosenman in settlement of his claim. The defendant also says that the plaintiffs are barred from collecting all of the amount claimed, except $10,497.34, because the balance is barred by the statute of limitations on the filing of claims for refund.

The latter defense we shall discuss first.

Louis Rosenman died on December 25, 1933. The executors were due to file an estate tax return on December 25, 1934, but as this date approached plaintiffs saw that it would be impossible by that time to file an accurate return; they, accordingly, on December 11, 1934, requested an extension of time. The Commissioner granted an extension until February 25, 1935, but in his letter, dated December 15, 1934, granting it he stated:

> The extension of time for filing the return does not operate to extend the time for payment of the tax. It is suggested that the tax be estimated and paid to avoid delinquency in payment, the consequent liability for penalty and the accumulation of interest at the rate of one per centum per month from the due date until paid.

In response thereto the plaintiffs on December 24, 1934, forwarded the Collector a check for $120,000 "as a payment on account of the Federal Estate tax." On February 25, 1935, plaintiffs filed a return showing a tax of $80,224.24. The Collector applied so much of the $120,000 toward the payment of the tax shown on the return, and retained the balance in the suspense account in which the remittance had been originally deposited, pending an audit of the return. After an audit, the Commisisoner, in April 1938, assessed [fol. 20] an additional tax of $48,534.84. The balance remaining in the suspense account, $39,775.76, was applied toward the satisfaction of this deficiency, and demand was made on the plaintiffs for the payment of the balance, together with interest. The plaintiffs paid this amount, $10,497.34, on April 22, 1938.

When plaintiffs filed the return showing the tax due of $80,224.24, they did not immediately demand refund of the

balance they had remitted on account of the tax, to wit, $39,775.76; but, no audit of its return having been made by March 26, 1938, plaintiffs on that date did file a claim for refund of the balance. This was about three years and three months after the remittance. Then, after payment of the additional tax assessed, plaintiffs filed another claim for refund on May 20, 1940, on the ground that the Commissioner had not allowed deductions of $91,685.45 for executors' commissions, $31,000 for attorneys' fees, $25,483.69 for miscellaneous administration expenses, and $25,000 which was paid in settlement of Martin Rosenman's claim.

Plaintiffs' right to recover depends on whether or not these two claims were filed within the statutory period of three years.[1]

Plaintiffs say that the remittance of $120,000 was merely a deposit and was not a payment of tax, and that the date the statute began to run was the date the deposit was applied in settlement of the tax found to be due. This position is untenable. The $120,000 was paid in response to the above-quoted statement in the Commissioner's letter granting the extension of time for filing the return, in which he stated that the extension of time for filing the return did not extend the time for payment of the tax, and in which he suggested that the tax be estimated and paid to avoid delinquency in payment and the consequent liability for penalty and interest. In the letter transmitting the $120,000 the executors said that it was being transmitted "as a payment on account of the Federal Estate tax."

If it had not been a payment, but was merely a deposit, it would not have prevented the accrual of the penalty for non-payment when due, nor stopped the running of interest. It was a payment of the amount of tax estimated to be due. [fol. 21] The fact that the Collector put the money in a suspense account to the credit of the executors seems to us immaterial. At the time the Collector received the money there was no charge on his books against plaintiffs against which the remittance might be credited; hence, he merely put it in a suspense account until the amount of plaintiffs' liability could be determined.

The $120,000 was a payment of estate tax, and the statute, therefore, began to run on the day it was paid. *Atlantic Oil*

[1] Sec. 810 of the Revenue Act of 1932, 47 Stat. 169.

Producing Co. v. *United States*, 92 C. Cls. 441, 35 F. Supp. 766.

The first claim for refund was not filed until more than three years thereafter. Plaintiffs, therefore, are barred from the recovery of any part of the $120,000.

The second claim for refund was filed within three years of the payment of the $10,497.34, and plaintiffs, therefore, are not barred from recovering such sum if it was in fact an overpayment.

This brings us to the question as to whether or not the plaintiffs are entitled to the deduction of the $25,000 paid in settlement of the claim of Martin Rosenman against the estate.

Martin Rosenman claimed that the decedent, his father, had given him $167,000 worth of securities during his lifetime, which the executors had taken and had treated as a part of the decedent's estate. These securities were found in two of decedent's lock boxes, to one of which Martin Rosenman had access. He claimed that the gift had been completed by delivery during decedent's lifetime and that the securities were in the possession of the decedent only for the purpose of administration for Martin Rosenman's benefit. On February 27, 1934, two months after his father's death, he made demand on the executors for the delivery of the securities to him, which he said "were held by the deceased for my account." Later, on July 23, 1934, he made demand upon them for the interest, dividends, and proceeds of sales of such securities as had been sold during the lifetime of Louis Rosenman. He said that the deceased had "collected these items and failed to turn them over," but he said that "these items may all be found in the check book of the deceased under my name and in his ledger as well."

[fol. 22] At first the executors rejected his claim, but as the result of further negotiations the parties came to an agreement on $25,000, to be paid in full satisfaction of Martin Rosenman's claims, subject to the approval of the Surrogate's Court. In the petition filed in the Surrogate's Court asking approval of the compromise, the executors said in part:

> The validity of the claim was apparently sustained to some extent by the fact that the decedent caused income tax returns to be prepared for the said claimant Martin Rosenman, reflecting in the same the income

from the said securities and the losses resulting from the sales of such of the securities as were sold during the taxable year which tax return entries could not be explained by a desire of the decedent to minimize income taxes, for the reason that the income returned was exceeded by the loss returned.

So, the executors were of the opinion that there was some evidence to show that the deceased had in fact made a gift during his lifetime to Martin Rosenman.

The Surrogate's Court appointed a special guardian to represent the interests of an infant beneficiary of the estate, and also a special guardian to represent another infant and the unborn and unknown beneficiaries of the estate. In the proceedings before a referee appointed to hear the matter, one of the guardians at first filed a report objecting to the compromise, but later withdrew his objection and agreed to it. The other guardian also agreed to the compromise. After a hearing the referee reported that the compromise was proper and should be approved, and the Surrogate's Court entered a decree accordingly.

The defendant says that Martin Rosenman's claim was based upon a mere promise to make a gift and, therefore, does not constitute a legal claim against the estate. This is manifestly incorrect. Martin Rosenman claimed that a gift had actually been made during the lifetime of the decedent. Upon no other basis could the Surrogate's Court have approved the compromise. If there had been nothing more than a promise to make a gift, Martin Rosenman would not have had any claim against the estate that would have justified the payment of anything. The decree approving the compromise was necessarily based upon the theory that there was some evidence to show that a completed gift had actually been made during decedent's lifetime.

[fols. 23-24] The defendant also says that the claim cannot be allowed because of the provision of the statute that deductions for claims against the estate were limited to such claims as "were contracted bona fide and for an adequate and full consideration in money or money's worth." It says a promise to make a gift is not supported by such consideration, but this argument fails for the same reason stated.

Martin Rosenman claimed, not under a promise, but as the result of a completed transaction. The statute refers to executory contracts, not to executed ones. Martin Rosen-

man's claim was that $167,000 worth of the securities, treated by the executors as a part of the assets of the estate, were not a part of its assets at all, but were his assets, because they had been given to him by the decedent during his lifetime. The judgment of the Surrogate's Court approving the settlement of $25,000 had the effect of excluding from the gross assets of the estate so much of the securities which the executors had been administering.

In neither *Glascock* v. *Commissioner*, 104 F. (2d) 475, nor *United States* v. *Mitchell*, 74 F. (2d) 571, nor *Latty* v. *Commissioner*, 62 F. (2d) 952, relied on by defendant, was it claimed that there had been a fully consummated gift during the lifetime of the decedent.

The plaintiffs are entitled to recover, but the entry of judgment will be suspended until the filing of a stipulation by the parties, or, in the absence of a stipulation, until the incoming of a report from a commissioner, showing the amount due, computed in accordance with this opinion. It is so ordered.

Madden, *Judge;* and Littleton, *Judge*, concur.

Jones, *Judge;* and Whaley, *Chief Justice*, took no part in the decision of this case.

[fols. 25-26] Order of Court Entering Judgment—April 13, 1944

Order. This case comes before the court on plaintiffs' motion for the entry of judgment; and it appearing that on February 7, 1944, the court filed special findings of fact with an opinion holding that plaintiffs are entitled to recover, but suspended the entry of judgment to await the filing of a stipulation showing the amount due plaintiff, computed in accordance with the court's decision; and it appearing that on March 13, 1944, a stipulation was filed, signed on behalf of the plaintiffs by Mitchell, Taylor, Capron and Marsh and on behalf of the defendant by Assistant Attorney General Samuel O. Clark, Jr., in which it is stated that the amount "computed to be due the plaintiffs from defendant in accordance with the opinion of the Court rendered on February 7, 1944, in the above entitled proceeding is $10,497.34 together with interest thereon as provided by law from April 22, 1938",—now, therefore,

[fols. 27-28] It Is Ordered this 3rd day of April, 1944, that plantiffs' motion for the entry of judgment be and the same is allowed, and judgment is entered in favor of plaintiffs in said sum of ten thousand, four hundred ninety-seven dollars and thirty-four cents ($10,497.34) together with interest thereon as provided by law from April 22, 1938.

[fol. 29] Clerk's Certificate to foreging transcript omitted in printing.

Endorsed on cover: File No. 48,660. Court of Claims. Term No. 207. Lena Rosenman and The National City Bank of New York, a Corporation, as Executors of the Last Will and Testament of Louis Rosenman, Deceased, Petitioners, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed June 29, 1944. Term No. 207, O. T. 1944.

[fol. 30] Supreme Court of the United States

Order Allowing Certiorari—Filed October 9, 1944

The petition herein for a writ of certiorari to the Court of Claims is granted and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.